No. 10975.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

LAWRENCE HAZARD,

Appellant,

vs.

COLUMBIA BROADCASTING SYSTEM, INC., a corporation; WALTER PIDGEON; LORETTA YOUNG; YOUNG & RUBICAM, INC., a corporation; and GOODYEAR TIRE & RUBBER CO., INC., a corporation,

Appellees.

APPELLEES' REPLY BRIEF.

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Statement of Facts.

Plaintiff and appellant is a writer who sometime prior to May 28, 1932, wrote an original dramatic composition entitled "A Man's Castle." This composition he copyrighted under date of May 28, 1932.

On March 25, 1933, appellant granted, sold, assigned and set over to Columbia Pictures Corporation certain rights in and to said dramatic work, and the instrument of conveyance and assignment is set forth at length in the Transcript of the Record [pp. 36-41].

Thereafter Columbia Pictures Corporation granted to the appellee, Walter Pidgeon, a license "to produce one (1) radio broadcast based upon your motion picture photo-

play entitled "Man's Castle" on the Goodyear program which I am producing on February 20, 1944." [Tr. p. 224.]

The complete broadcast so produced on February 20, 1944, is set forth in the Transcript [p. 7].

Appellant now contends that the broadcast constituted an infringement of appellant's copyright of the dramatic work entitled "A man's Castle," and appellees answer is that they were authorized to make such broadcast under their license from Columbia Pictures Corporation, and that Columbia Pictures Corporation in turn was authorized to execute such license by virtue of the bill of sale and assignment executed by appellant.

Two other facts are worthy of mention:

First, the radio broadcast is based upon the motion picture version of appellant's dramatic work rather than upon the work itself. This fact is expressly found by the court [Findings, par. 9, Tr. p. 252] in the following language:

> "9. The radio broadcast referred to in the foregoing paragraph was a sketch of the motion picture version of plaintiff's dramatic work."

This finding is fully supported by the record, it appearing therefrom [Tr. p. 229] that upon the hearing the parties stipulated as follows:

> "That the radio adaptation which was broadcast by the defendant Pidgeon, was written by one Charles Tazewell, and that Tazewell, if called as a witness in this case, would testify that he wrote the radio adaptation entirely from the screen play, that is to say, the motion picture scenario, and the dialogue, and that he did not have before him and had no access to the plaintiff's original dramatic composition."

Indeed, appellant himself says:

> "The transcript does not contain a copy of plaintiff's original manuscript but it does contain copies of the motion picture and radio scripts. The failure to include the manuscript of the original work was not due in any sense to oversight. The omission resulted from the fact that since, admittedly, the motion picture script was based upon the manuscript of the original work, and since the radio script was based upon the motion picture script, no useful purpose would have been served in cluttering the record on appeal unnecessarily with voluminous copy." (Appellant's Op. Br., pp. 19-20.)

The important thing, for reasons hereinafter indicated, is that in interpreting the language of the grant or bill of sale it must be assumed to be a fact that the radio script is based upon the motion picture scenario, and that in preparing such radio script no use whatever was made of appellant's dramatic work.

Second, the radio broadcast makes use of only a very small part of the screenplay or scenario. It is, in fact, a mere outline or synopsis produced in dialogue from the story told by the motion picture. It is in fact what we believe to be a *sketch* of the motion picture scenario. The entire radio broadcast lasted but thirty minutes. It is set forth in full in the Transcript at pages 7 to 32, inclusive. On the other hand, the portrayal upon the screen of the motion picture scenario occupied the best part of two hours, and is to be found at pages 47 to 223, inclusive, of the Transcript. The mere difference in length of the radio broadcast and the motion picture scenario establishes conclusively that the former is but a small part of the latter. This again is important in construing the language used in the instrument of grant or assignment.

Assignment of Errors.

While appellant specifies the errors complained of under five separate headings, there are in fact only two grounds which he urges as a basis of reversal.

First: The trial court erred in holding that the radio broadcast of February 20, 1944, was a right granted under the grant and bill of sale executed by the plaintiff and appellant to Columbia Pictures Corporation.

Second: The court erred in refusing to admit in evidence Plaintiff's Exhibit 1 for identification.

ARGUMENT.

I.

The Grant and Bill of Sale Executed by Appellant to Columbia Pictures Corporation, Dated March 25, 1933, Authorized the Radio Broadcast Upon Which Appellant Relies As an Infringement of His Copyright.

Basically, appellant's position is that the radio broadcast constituted an infringement of the copyright of plaintiff's dramatic composition. This infringement, appellant contends, results from the fact that the granting clause of the instrument, under which Columbia Pictures Corporation acquired from appellant certain rights in the dramatic composition, is not sufficiently broad to include the radio broadcast.

> "this phase of the problem which is presented to this court upon appeal is solely one of determining the proper interpretation of that contract, the license agreement of March 25, 1933." (Appellant's Br. p. 9.)

In determining whether the defendants exceeded the rights given them by the contract it must, however, be kept in mind that as found by the court, and established by the evidence, the radio broadcast is based upon the motion picture version of appellant's dramatic work rather than upon the work itself, and secondly, that a comparison of the radio broadcast with the motion picture scenario clearly shows that the former is only an outline or sketch of the latter. The language of the grant is, it seems to us, too certain and definite to leave any room for construction or interpretation.

Appellant gave to Columbia Pictures Corporation certain rights set forth in paragraphs 1 and 3 of the bill of sale.

Thus, in paragraph 1, appellant grants, sells, assigns and sets over to Columbia Pictures Corporation the entire motion picture rights in and to the dramatic work, together with all of the benefits of the copyrights of such work, and of all remedies for enforcing such copyrights with respect to such motion picture rights. Then the "Owner" (appellant here) in paragraph 1 proceeds to grant *seriatim* to Columbia Pictures Corporation (1) the exclusive right to make motion picture versions, etc.; (2) to translate, adapt, arrange, change, transpose, add to and subtract from such work and the title thereof to such extent as to the purchaser may deem expedient; (3) to use excerpts from such work for the title, sub-titles, text and dialogue of such motion picture versions; (4) to publish, for the purpose of advertising and exploiting such motion picture versions, in such form as the purchaser may deem advisable, including its publication in newspapers, fan magazines and trade periodicals, a synopsis or story of

such motion picture versions, not exceeding ten thousand words in length; (5) to use excerpts from such work in heralds, programs, booklets, posters, lobby displays, press books and all other mediums of advertising and publicity whatsoever; (6) *to broadcast sketches of such motion picture versions;* (7) to use parts of such work or the theme thereof in conjunction with other work or works in the making of motion picture versions; (8) the exclusive, unlimited and unrestricted right to produce, reproduce, distribute, exhibit and otherwise exploit and dispose of such motion picture versions; (9) to secure copyright and copyright registration therein in all countries of the world in the purchaser's name or otherwise. [Tr. pp. 36-37.]

A reading of this paragraph of the bill of sale indicates that these rights are several and distinct, and in no respect dependent one upon the other. The context of the granting clause in nowise subordinates the right "to broadcast sketches of such motion picture versions" to the right to make motion picture versions, and it cannot be logically contended that there is less doubt about the right of the grantee to broadcast sketches than there is of the right to make motion picture versions. The value of this particular right to Columbia Pictures Corporation arises not only because of the fact that a sale of this right could be had, as in this case for $750.00, but because the assignee of the right agrees "In all advance radio announcements and immediately preceding the presentation of the broadcast of my radio adaptation of said motion picture version, I agree to announce the title of said motion picture version and the fact that it is a Columbia Picture Corporation production." [Tr. p. 225.]

It is the contention of the appellees that what has been done by them is fully justified by the grant of the right to broadcast sketches of the motion picture versions of the dramatic composition. Their right does not rest on that provision of the bill of sale alone, however, for in paragraph 3 the motion picture rights as granted and assigned in the instrument are described as including "the exclusive right to make and use disc records, sound on film, and any and all other mechanical contrivances or devices for the recordation of the sound and talking and musical and other audible portions of any such motion picture versions and for the reproduction and performance of all such sounds as part of or incidental to the exhibition thereof, and also include the exclusive right to project by television, radio, electricity or in any other manner any such motion picture versions, including the sound, talking, singing and other audible portions thereof, through space, for exhibition and performance at any and all places away from that wherein any such motion picture versions shall be exhibited and performed." [Tr. p. 39.]

Appellant finds difficulty in construing the phrase "motion picture version," and argues that in the final analysis what was actually broadcast was appellant's original play as adapted for use in broadcasting. We think that the meaning of the phrase is plain. Appellant wrote a stage play. That was the stage version of his dramatic composition. He gave Columbia Pictures Corporation the motion picture rights in his stage play, and additional rights in the motion picture version of the stage play. Columbia Pictures Corporation prepared a scenario or screenplay which differed in vital parts and substantial respects from the stage version. This would have been immediatey apparent had appellant included in the record a copy of the

appellant's original work. This was the motion picture version, and in view of the stipulation of the parties hereinabove set forth, and of the findings of the court, it is not now open to question that the broadcast was based upon the motion picture version.

The argument of appellant proves too much. He contends that there was either "one version, to-wit, the original version, and that the motion picture and radio vehicles were but two separate adaptations of that version; or there were three versions, to-wit, the original version, the motion picture version and the radio version." (Appellant's Br. p. 15.) This argument completely overlooks the fact that the contract between the parties provided for the right to broadcast a sketch of the motion picture version, and there can be no possibility that the parties had anything in mind other than the version of the dramatic composition as exemplified in the motion picture as distinguished from the version of the dramatic composition as set forth in the stage play.

Appellant nowhere indicates what he believes to have been the intention of the parties in the use of the phrase "motion picture version." He contents himself with the assertion that there was no such version. But the motion picture version as such could not be broadcast. It would have to be adapted, both as to content and length, to the radio program on which it was to be broadcast. The right to broadcast a sketch of the motion picture version therefore necessarily implies a right to take the motion picture scenario dialogue and continuity and to adapt it for use in broadcasting. Hence it is clear that a sketch of the motion picture version is the motion picture version adapted to the particular broadcast for which it was in-

tended. In other words, when appellant granted to Columbia Pictures Corporation the right to broadcast a sketch of the motion picture version, and when Columbia Pictures Corporation granted to appellees the right "to condense, modify, and adapt the abovesaid motion picture version in such manner as to conform to the requirements and needs of radio broadcasting" [Tr. pp. 224-225] the identical right was conveyed in each instance.

Finally appellant asserts in this part of his argument that reference to the radio script shows that the whole play was broadcast, not just a sketch. A comparison, however, reveals that what was broadcast over the radio, including all of the advertising and other announcements, occupies but twenty-five pages of the Transcript [pages 7 to 32, inclusive], while the scenario and dialogue continuity of the motion picture version occupies one hundred and seventy-six pages of the Transcript [pages 47 to 223, inclusive].

The second part of appellant's argument relative to the proper construction of the contract is stated in his language as follows: "The general language of the contract, when considered in connection with articles 1 and 3 thereof, did not permit this broadcast." To support this premise, appellant refers to article 2, which sets forth the warranties of the author. He asserts that these warranties do not relate to any broadcasting or other radio rights, and he asks why, if it was intended that such rights should pass to Columbia Pictures Corporation, the warranty was not sufficiently extensive to cover such rights. The best and simplest answer to this argument is that if, as we have argued heretofore, what was done by the appellees was to broadcast a sketch of the motion picture version,

the appellant's warranty includes any loss, damage or other injury resulting to the appellees therefrom. Thus the specific language of the warranty is this: "The Owner agrees and guarantees to defend, indemnify and hold the Purchaser harmless against any losses, damages, expenses or judgments which may be sustained or suffered by or secured against the Purchaser by reason of . . . the exercise or attempted exercise of any of the rights hereby granted." [Tr. p. 38.] It is the position of the appellees that one of the rights granted is that of broadcasting sketches of the motion picture version, and accordingly the warranty extends to that right. No further answer to appellant's contention in this respect seems necessary.

II.

The Trial Court Did Not Err in Denying Appellant the Right to Introduce As Evidence in the Case Plaintiff's Exhibit 1 for Identification.

The exhibit referred to was a printed form, in blank, unexecuted, whereby some undesignated person purports to grant to Columbia Pictures Corporation certain rights in and to an undesignated property referred to as "the work." [Tr. p. 241.] This form was offered as evidence, with the statement by counsel for appellant that it is a printed form of contract which at one time or another was used by Columbia Broadcasting System (Columbia Pictures Corporation). [Tr. p. 228.] There was nothing to indentify this contract, or the time of its use, whether before or subsequent to the date when appellant executed the bill of sale involved in this controversy. The fact that Columbia Pictures Corporation may at some time or another have made use of a different form of con-

tract of which, so far as the record shows, appellant had no knowledge, is so patently incompetent and immaterial as to require no argument. The form may have been used at a date either prior or subsequent to, the date of the execution of the contract by appellant; it may have been used in conjunction with the same form of contract as that used in the deal with appellant; or it may have been used in acquiring different or additional rights. In any event, it could be of no possible aid to the court in the determination of the question before it.

It is respectfully submitted that the conclusion arrived at by the trial court is correct, and that the judgment entered therein should be affirmed.

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GUY KNUPP,

Attorneys for Appellees.